Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding	)	CG Docket No. 17-131
Broadband Speed Disclosure Requirements	)	

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION AND USTELECOM

NCTA – The Internet & Television Association ("NCTA") and USTelecom submit these reply comments in response to the comments filed regarding the Petition for Declaratory Ruling submitted on May 15, 2017 in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

The record reflects broad support for the relief sought by the Petition. In addition to Petitioners NCTA and USTelecom, which are the leading trade associations for cable broadband providers and wireline broadband providers, respectively, the American Cable Association ("ACA") filed in support of the Petition on behalf of its small and mid-sized cable provider members—explaining that allowing a patchwork of inconsistent state regulation of broadband speed disclosures would pose significant challenges for its members.[2] CenturyLink also filed comments urging the Commission to grant the Petition, noting the harms that inconsistent federal and state disclosure standards threaten to cause both for providers of broadband Internet access

---

1 *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, CG Docket No. 17-131 (filed May 15, 2017) ("Petition"); *see also* Public Notice, *Comment Sought on USTelecom and NCTA – The Internet & Television Association Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, CG Docket No. 17-131, DA 17-482 (rel. May 17, 2017).

2 *See* Comments of the American Cable Association, CG Docket No. 17-131 (filed Jun. 16, 2017) ("ACA Comments").

service ("BIAS") and for consumers alike.[3] The Petition also finds support from beyond the ranks of BIAS providers, as ADTRAN, a leading provider of networking and communications equipment, identified various practical and technical issues with the alternative disclosure approaches advanced by the states.[4]

Opponents of the Petition fundamentally misapprehend the scope of the Petition as a request for complete preemption of state consumer protection laws. The Petition, however, makes no such request. Even a cursory review of the Petition reveals that it does *not* ask the Commission to issue a broad "field preemption" ruling; rather, it seeks to confirm the primacy of federal law where, as here, there is a direct conflict between state efforts to require BIAS providers to measure and describe their BIAS offerings based on idiosyncratic standards and the Commission's requirements for how those offerings are measured and described under its uniform national framework for broadband disclosures. Thus, many of the opponents' legal contentions simply miss the mark.

Other arguments advanced by opponents likewise can be readily rejected. For instance, those commenters that do attempt to address the conflict between the Commission's broadband disclosure regime and the state enforcement initiatives described in the Petition fail to establish that these federal and state efforts can coexist. State laws imposing liability for conduct that complies with federal laws are routinely found to be preempted—especially where, as here, the conduct falls within an express safe harbor. The Commission also should reject the notion that the Administrative Procedure Act ("APA") precludes the issuance of the declaratory rulings

---

3 *See* Comments of CenturyLink, CG Docket No. 17-131, at 1-2 (filed Jun. 16, 2017) ("CenturyLink Comments").

4 *See* Comments of ADTRAN, Inc., CG Docket No. 17-131, at 1-2 (filed Jun. 16, 2017) ("ADTRAN Comments").

sought by the Petition, or that public policy counsels against doing so. There is no procedural barrier to granting the Petition, and public policy *favors* a uniform, national framework for BIAS speed disclosures.

The Commission thus should proceed to grant the Petition and issue a declaratory ruling clarifying that (a) a broadband provider's disclosure of average broadband speeds during periods of peak demand (as tested through the Measuring Broadband America program) is sufficient to comply with the requirement under Section 8.3 of the Commission's rules to disclose accurate information regarding the provider's speed performance, (b) such disclosures are otherwise just and reasonable within the meaning of Section 201(b) of the Communications Act (to the extent it continues to apply to BIAS providers), and (c) broadband providers retain flexibility to comply with the Transparency Rule through means other than this safe-harbor approach.

DISCUSSION

I. THE RECORD REFLECTS BROAD-BASED SUPPORT FOR THE PETITION FROM VARIOUS PARTICIPANTS IN THE INTERNET ECOSYSTEM

As noted above, multiple parties representing a wide array of interests filed comments supporting the Petition. For instance, ACA explained in its comments that the harms to small providers from inconsistent state and federal regulations would be enormous. "Virtually none" of its 680 members serving fewer than 20,000 customers has "in-house counsel or other personnel dedicated to addressing" inconsistent state regulation.[5] Instead, these smaller broadband providers rely heavily on "compl[iance] with the [Commission's] Transparency Rule" in order to meet their disclosure obligations.[6] ACA also emphasized that public policy concerns strongly support the petition; the "costs" from inconsistent state regulation "would generally be

---

5 ACA Comments at 6 n.12.

6 *Id.*

passed through to customers," and the inconsistent state requirements would only "cause substantial confusion to the public" about BIAS speeds.[7]

CenturyLink echoed these concerns in its comments, presenting its perspective as a larger BIAS provider. As CenturyLink explained, "the Commission, since 2010, has regulated BIAS providers' descriptions of Internet access speeds and has developed a unified regime that balances technical accuracy and usefulness to consumers."[8] But "emerging state action is creating the opposite result," CenturyLink noted, "by introducing inconsistent metrics and consumer confusion."[9] CenturyLink thus urged the Commission to grant the precise relief sought by the Petition in order to "confirm and clarify key aspects of the broadband speed disclosure regime."[10]

ADTRAN, meanwhile, provided an important non-ISP viewpoint on inconsistent state regulation of broadband speed disclosures. ADTRAN "has been an active participant in and contributor to the Commission's efforts to date to establish broadband measurement requirements," and emphasized that "states utilize alternative measurement tools, including speed tests" that may not provide "an accurate measure of broadband networks' actual operations."[11] ADTRAN explained that the States' tools fail to account for "a variety of factors" that might affect the speeds that consumers experience—including "the technology being used," the possibility of "congestion in the network or other anomalies that make the results unrepresentative," the impact of "other devices and/or programs running on a consumer's

---

7 *Id.* at 7, 9.

8 CenturyLink Comments at 1.

9 *Id.* at 1-2.

10 *Id.* at 2.

11 ADTRAN Comments at 3.

network," and "the distance between the consumer's home and the measurement node for that particular speed measurement tool." As ADTRAN points out, "the Commission has designated use of the Measuring Broadband America testing program as a 'safe harbor' for compliance with the Commission's Open Internet disclosure requirements" precisely because the program was "designed" to account for these issues.[12]

II. THE ARGUMENTS OPPOSING THE RELIEF REQUESTED IN THE PETITION LACK MERIT

On the other side of the ledger, State AGs and some allied advocacy groups raise various arguments as to why they believe the requests for clarification in the Petition should not be granted. But each of these arguments rests on mischaracterizations of the Petition, clear misstatements of law, or both.

A. Opponents' Arguments on Preemption Miss the Mark

As an initial matter, all of the opponents rely on straw-man arguments that fundamentally mischaracterize the Petition and ignore the legal issues actually in dispute. They principally urge the Commission to deny the Petition based on the misguided theory that it represents a generalized "assault on traditional state police power" by supposedly seeking a ruling that federal law is "the exclusive means of bringing" consumer protection claims against BIAS providers.[13] In support of these arguments, the opponents cite various court decisions addressing

---

12 *Id.* at 3, 4.

13 Comments of Eric Schneiderman, Attorney General of New York, *et al.*, CG Docket No. 17-131, at 3 (filed Jun. 16, 2017) ("State AG Comments"); *see also, e.g.*, Comments of Center for Democracy and Technology *et al.*, CG Docket No. 17-131, at 8 (filed Jun. 16, 2017) ("CDT Comments") (arguing that "[I]nternet service providers are not wholly exempt from state law"); Comments of Public Knowledge, CG Docket No. 17-131, at 2, 4-6 (filed Jun. 16, 2017) ("PK Comments") (contending that the Commission should not conclude that its rules "occupy[] an entire field of regulation" (internal citations and quotation marks omitted)); Comments of the Institute for Local Self-Reliance, CG

the doctrine of "complete preemption"[14]—a jurisdictional standard that applies solely in the context of motions to remand cases that have been removed from state court on federal question grounds,[15] and that accordingly has nothing to do with the Petition or the Commission's regulatory authority. Opponents also raise various arguments as to why the Commission should not invoke "field preemption,"[16] where federal law is said to "occup[y] a legislative field" and preclude all forms of state regulation in that field.[17]

These arguments flatly mischaracterize the relief sought by the Petition. The Petition does not implicate the doctrine of "complete preemption" (which is inapplicable outside the removal context), nor does it seek a broad "field preemption" ruling precluding *all* state enforcement of consumer protection statutes against BIAS providers. Rather, the Petition urges the Commission to "reinforce the primacy of federal law" with respect to specific broadband speed measurement and disclosure issues—an area where the Commission has adopted detailed regulatory requirements and provided related guidance over the years—in the face of a

---

Docket No. 17-131, at 2 (filed Jun. 16, 2017) ("ILSR Comments") (arguing broadly that the Commission should not "preempt states from protecting BIAS subscribers").

[14] State AG Comments at 3-4 (citing *Pinney v. Nokia*, 402 F.3d 430 (4th Cir. 2004) & *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998)); CDT Comments at 8 (citing *Marcus v. AT&T* & *Fisher v. NOS Communications*, 495 F.3d 1052 (9th Cir. 2007)).

[15] *See Retail Prop. Trust v. United Bhd. of Carpenters*, 768 F.3d 938, 948 (9th Cir. 2000) (explaining that the complete preemption doctrine is "applicable to removal jurisdiction only"); *see also Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 273 & n.7 (2d Cir. 2005) (same).

[16] *See, e.g.*, PK Comments at 2, 4, 6 (mentioning "field" preemption). Notably, commenter CDT also discusses "field preemption" but in doing so cites only to *complete* preemption cases. *See* CDT Comments at 8.

[17] *See Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992).

"patchwork of conflicting requirements" that state officials increasingly are seeking to impose.[18] Accordingly, the appropriate lens for analyzing any preemption issues arising under the Petition is the doctrine of "conflict preemption"—under which "state law is naturally preempted to the extent of any conflict" with federal law, including where "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law.[19] Opponents' arguments addressing *other* forms of preemption are simply inapposite here.[20]

Thus, for instance, the State AGs' contentions that state and federal authorities have a "cooperative partnership" and "concurrent authority" over BIAS providers, while overstated, are beside the point.[21] As a threshold matter, unlike the traditional partnership between the FCC and the states applicable to the public switched telephone network, states have a minimal role when it comes to regulating BIAS providers, given the jurisdictionally interstate nature of the service.[22]

---

18 Petition at 2; *see also, e.g.*, *id.* at 5 ("Issuing such a declaratory ruling will help prevent the imposition of liability based on idiosyncratic standards that conflict with this Commission's transparency regime.").

19 *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *see also Capital Cities Cable v. Crisp*, 467 U.S. 691, 699 (1984) ("Federal regulations have no less pre-emptive effect than federal statutes.").

20 Notably, other aspects of the Commission's broadband policy framework support broader preemption of state laws, under both the conflict preemption and field preemption doctrines, but because the Petition only narrowly addressed certain aspects of the Transparency Rule pertaining to the measurement and description of broadband speeds—without implicating other aspects of the Commission's framework for broadband services—those issues are not implicated in this proceeding.

21 State AG Comments at 7.

22 *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 431 (2015) ("*2015 Open Internet Order*") (reaffirming "the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes"); *see also, e.g.*, *Ivy Broad. Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (holding that interstate communications services are "governed solely by federal law" and states therefore are generally "precluded from acting in this area").

But even assuming that BIAS providers can be subject to certain state consumer protection laws, controlling precedent dictates that state efforts to impose conduct requirements or prohibitions must give way where, as here, they conflict with federal law. As the D.C. Circuit has explained, "[c]ourts have consistently held that when state regulation . . . would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."[23] And the Commission has announced its "firm intention to exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme" it has adopted for BIAS.[24] In sum, whatever ability states have to investigate or regulate the conduct of BIAS providers, such regulation cannot conflict with federal law.

Some of the opposing commenters claim that no conflict exists, but these arguments are meritless. Public Knowledge, for instance, asserts that efforts by state officials to regulate broadband speed disclosures "can coexist" with the Commission's federal transparency requirements.[25] But state efforts to impose liability based on conduct that falls within the federal safe harbors for characterizing broadband speeds cannot "coexist" with the Commission's regime. To the contrary, such state theories, if not preempted, would nullify the federal safe harbor and would plainly upend the federal regime more generally.

Critically, there is no neutral, objectively correct method of measuring or describing "actual" broadband performance; there are only various testing protocols that make various assumptions and include (or exclude) certain variables. For example, some tests (like the

---

23 *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) ("*CCIA*").

24 *2015 Open Internet Order* ¶ 433.

25 PK Comments at 6.

SamKnows protocol used in the MBA program) measure speeds on a device located between the broadband modem and the BIAS provider's headend or central office, whereas other tests are browser-based, and thus introduce variables based on the end user's computer and other in-home factors. By the same token, some tests (again, such as SamKnows) seek to isolate performance on the BIAS provider's network, whereas others may be affected by upstream factors on transit providers' networks. After extensive consideration of these issues, the Commission settled on a preferred, safe-harbor approach for measuring and describing "actual" speeds—namely, based on the peak-period average speeds reported through the MBA program.[26] A state that seeks to impose liability based on a provider's failure to adhere to a *different* method for measuring and describing broadband speeds—which necessarily yields inconsistent results compared to the MBA safe harbor—impermissibly "interferes with the methods by which the federal statute was designed to reach [its] goal."[27]

---

[26] *See Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶ 58 n.188 (2010) ("*2010 Open Internet Order*") (describing goal of MBA program as enabling providers to "measure the actual speed and performance of broadband service"); FCC, Advisory Guidance for Compliance with Open Internet Transparency Rule, GN Docket No. 09-191, at 4 (June 30, 2011) (encouraging BIAS providers to describe actual network performance by "disclos[ing] data from the [MBA] project showing the mean upload and download speeds in megabits per second during the 'busy hour' between 7:00 p.m. and 11:00 p.m. on weeknights); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5673 ¶ 166 (2015) (indicating that broadband providers should convey information on actual speeds by disclosing the "average performance over a reasonable period of time during times of peak usage" (emphasis added)).

[27] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). As noted in the Petition, the FCC also gave BIAS providers flexibility to characterize network performance in ways that diverge from the MBA safe harbor approach. *See, e.g.*, Petition at 5; *2010 Open Internet Order* ¶ 56 (concluding that "the best approach is to allow flexibility in implementation of the Transparency Rule, while providing guidance regarding effective disclosure models"). But while the Commission gave *BIAS providers* such flexibility to elect such alternative methods, a *state* does not have flexibility to mandate any such alternative and to impose liability on those that fail to adhere to the state's preferences. To the contrary,

The Environmental Protection Agency's ("EPA") fuel efficiency regime is analogous to the Commission's oversight of broadband speed measurement and descriptions, and similarly preempts conflicting state efforts to regulate the same subject matter. Federal law provides that "every new vehicle sold in the United States must be labeled with a sticker . . . indicating estimated fuel economy, and . . . a booklet comparing fuel economies of similar vehicles, prepared by the EPA."[28] Courts have held that this regime precludes liability under state law for failure to provide "some other 'actual' fuel economy calculation."[29] Again, the state actions described in the Petition suggest the opposite is true with BIAS speed disclosures—that states *can* mandate disclosures based on *different* speed calculation methodologies and that liability can attach notwithstanding the proper use of the federally authorized figures. That is not the law.

Public Knowledge also argues that the Commission is somehow precluded from reaffirming its national policy for broadband speed characterizations where such statements are incorporated in advertisements, because the advertising at issue supposedly is purely "intrastate."[30] But this argument is a red herring. It misses the point that the Petition addresses speed characterizations that are based on the Commission's rules and guidance, not advertising *per se*. The argument also is factually inaccurate. BIAS is generally marketed on a nationwide or regional basis; that is why the Commission's safe-harbor consumer label is expressly intended

---

such mandates are the opposite of the flexible approach adopted by the Commission and thus impermissibly frustrate the purpose of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

28 *In re Ford Fusion and C-Max Fuel Economy Litig.*, 2015 WL 7018369, at *4 (S.D.N.Y. Nov. 12, 2015).

29 *Id.* at *27; *see also Sanchez v. Ford Motor Co.*, 2014 WL 2218278, at *4 (D. Colo. May 29, 2014) (finding that the "advertisement contains the very disclosure language required by federal law" and that state law challenges were therefore preempted).

30 PK Comments at 2-3.

to enable apples-to-apples comparisons of different providers' services across different states.[31] In any event, the argument proves too much; if broadband speed disclosures truly involved only "intrastate" communications with customers, and if the supposedly intrastate nature of that activity put it beyond the reach of the Commission, then the Commission's transparency requirements for BIAS providers would be rendered a nullity. Indeed, Public Knowledge's arguments are undermined by the very cases they cite, which hold that "when state regulation of intrastate [activity] would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."[32]

B. The Commission May Provide the Requested Relief Without Making Factual Findings in This Proceeding or Conducting a Rulemaking

The State AGs also argue that the Petition "seeks a factual finding" that the Commission cannot make without a "factual record."[33] But the Petition states quite plainly that it does *not* ask the Commission to make any factual findings—as to any provider's specific disclosures or on any other issue. Rather, the Petition seeks clarification only with respect to questions of law and policy,[34] which the Commission may lawfully provide without fact-finding. As the Supreme

---

31 Fed. Commc'ns Comm'n, *2016 Measuring Broadband America Fixed Broadband Report* (rel. Dec. 1, 2016), at 7, *available at* http://data.fcc.gov/download/measuring-broadband-america/2016/2016-Fixed-Measuring-Broadband-America-Report.pdf ("*2016 MBA Report*").

32 *CCIA*, 693 F.2d at 214 (cited in PK Comments at 2-3).

33 State AG Comments at 5.

34 Petition at 5 (seeking "declaratory ruling confirming that a BIAS provider's disclosure of its average downstream and upstream speeds during the period of peak demand complies with" federal law; that "BIAS providers retain flexibility to comply with the Transparency Rule through alternative disclosures beyond this safe-harbor approach, and that broadband providers can meet these disclosure obligations by posting the required information on the provider's website" and clarification that "it is consistent with federal

Court has explained, unless another statute provides otherwise, the APA "establishes the *maximum* procedural requirements" with which an agency must comply.[35] The APA contains no special "fact-finding" duty in the course of issuing a declaratory ruling, and therefore none exists.[36] Here, the Commission has "specified the legal issues on which it would rule, [and] allowed the parties to submit comments on these issues."[37] No more is required.[38]

Nor does the requested relief require "an Administrative Procedure Act rulemaking," as opponents of the Petition assert.[39] The Petition does not ask the Commission to promulgate any new rules; it simply seeks clarifications regarding *existing* law. Where, as here, the "declaratory ruling[] at issue" merely entails the Commission's "interpretation of [an] existing regulation,"[40] the Commission is "not required to comply" with the APA's notice and comment rulemaking requirements.[41]

---

law for broadband providers to advertise the maximum ('up to') speeds available to subscribers on a particular tier, so long as the provider otherwise meets its obligations under the Commission's transparency requirements").

35 *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653 (1990).

36 *See id.* at 654 (APA imposes only a "general 'procedural' requirement" that "mandate[s] that an agency take whatever steps it needs to provide an explanation that will enable" judicial review); *see also, e.g.*, *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996) (agency "need not include detailed findings of fact but must" only "inform" relevant parties "of the grounds of decision"); *City of Colorado Springs v. Solis*, 589 F.3d 1121, 1134 (10th Cir. 2009) (same).

37 *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000).

38 *Id.*

39 State AG Comments at 5; *see also* PK Comments at 9 (asserting that the "request amounts to a change in the Commission's rules and policies and should go through the formal rulemaking process"); ILSR Comments at 3 (arguing that the Commission "must engage in proper rulemaking" in order to grant the requested relief).

40 *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009).

41 *Id.*; *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("This exemption of interpretive rules from the notice-and-comment process is categorical.").

C. Opponents Also Fail To Identify Any Reasonable Policy or Prudential Grounds for Denying the Petition

Opponents' claims that prudential and policy-based reasons militate against the requested clarifications are likewise unavailing. Public Knowledge argues, for instance, that the Commission should refrain from addressing the Petition because "the Commission's recent Notice of Proposed Rulemaking in the Matter of Restoring Internet Freedom (NPRM) leaves continued statutory authorization for the federal transparency rules in question."[42] But, again, Public Knowledge overlooks the fact that the Petition seeks clarifications regarding *existing* law (as applicable to *historical* conduct being investigated or litigated by state AGs). By contrast, whatever action the Commission takes with respect to its transparency rule in its pending *Restoring Internet Freedom* proceeding (if any) will have only *prospective* effect.

Public Knowledge also suggests that, as a matter of policy, the Commission should make way for state efforts to establish their own broadband speed disclosure requirements pursuant to state consumer protection laws because the Commission purportedly "desperately needs the technical and personnel resources of state and local governments" in this regard.[43] This has the landscape backwards; matters involving communications issues in general, and "broadband technologies" in particular, are "well within the [Commission's] area of expertise,"[44] and the *States* routinely seek the *Commission*'s expertise on such matters—not the other way around.[45]

---

42 PK Comments at 9.

43 *Id.* at 9-10 (internal citations and quotation marks omitted).

44 *EarthLink v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006).

45 *See, e.g., Dickinson v. Cosmos Broad. Co.*, 782 So. 2d 260, 263 (Ala. 2000) (deferring to Commission's "expertise" on "complex and often arcane practices of the broadcast advertising industry"); *Disc. Commc'ns, Inc. v. Bellsouth Telecommunications, Inc.* 2002 WL 1255674, at *3 (Tenn. Ct. App. June 7, 2002) ("defer[ring] to the expertise of the FCC in interpret[ative]" question).

Finally, ILSR makes various generalized assertions about the need to ensure that BIAS providers' disclosure obligations reflect the evolving technical characteristics of the Internet and consumer expectations about broadband.[46] NCTA and USTelecom agree that BIAS disclosures should accord with those considerations; that is precisely why they have filed the Petition seeking interpretative guidance from the Commission on a uniform, national approach for such disclosures, and why it would be so harmful to create a patchwork of inconsistent obligations in this dynamic marketplace.[47] Indeed, as the Petition explains, forcing BIAS providers to "tailor their disclosures on a state-by-state or jurisdiction-by-jurisdiction basis" would expose consumers to a confusing "barrage of different disclosures based on complex metrics that vary from area to area,"[48] thus undermining the Commission's efforts to establish a "harmonious and consistent reporting metric for use across all broadband technologies" as the marketplace continues to evolve.[49]

---

46 *See* ILSR Comments at 2-3.

47 *See, e.g.*, *Farina v. Nokia, Inc.*, 625 F.3d 97, 106 (3d Cir. 2010) (recognizing importance of "uniformity in . . . technical standards" in order "to ensure an efficient nationwide system").

48 Petition at 15.

49 *2016 MBA Report* at 7.

CONCLUSION

For the foregoing reasons and for those set forth in the Petition, the Commission should grant the Petition and issue the requested declaratory rulings.

Respectfully submitted,

USTELECOM

By: */s/ Jonathan Banks*

Jonathan Banks
USTelecom
607 14th Street, NW
Suite 400
Washington, D.C. 20005

NCTA – THE INTERNET & TELEVISION ASSOCIATION

By: */s/ Rick Chessen*

Rick Chessen
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW
Suite 100
Washington, D.C. 20001

July 3, 2017